taking into account the possible future effects of the injuries, because they appear to me to be purely hypothetical. I am also not taking into account any hypothetical lowering of the plaintiff's intelligence or mental capacity by reason of her head injury. In this connection the State Surgeon, Johore, stated that he had no way of judging whether the plaintiff's intelligence had been lowered, because he had no knowledge of her intelligence quotient before the accident. The only evidence of the so-called lowering of intelligence that has been produced is that the plaintiff was in a Government school before the accident and that since the beginning of this year she has had to go into a private school because she failed her examination last year. None of her teachers was called to give evidence of her mental capacity both before and after the accident so as to enable the court to judge whether, and if so, to what extent, there has been a lowering of her mental capacity. The plaintiff has suffered no adverse cosmetic effects, but she will have a limp in her left leg for the rest of her life with its attendant handicaps, disabilities and disadvantages extending perhaps to her matrimonial prospects.

Having assessed the plaintiff's contributory negligence at 50%, I would allow her claim for general damages in the sum of $4,000. As regards special damages, I would allow $350 for transport expenses of the plaintiff's parents and other relatives to visit her in the hospitals, $250 for special food while she was undergoing treatment and $111 paid to a woman to look after her while she was under treatment, making a total of $711 and then halving it. There will be judgment therefore for plaintiff for $4,355.50 and costs. The amount of special damages when paid can be paid out to the plaintiff's next friend. The sum of $4,000 in respect of general damages when paid must be paid out to the Public Trustee to be held by him in trust for the plaintiff until she attains the age of twenty-one years.

Claim allowed.

Solicitors: *D. A. Devadason; Keith Sellar & Co.*

CHEW GEOK LIN v. PAU PING KWONG

[O.C.J. (Lee Hun Hoe J.C.) September 12, 1964]

[Sibu — Civil Suit No. CS/36 of 1964]

Landlord and tenant — Statutory tenancy — Rent lawfully due — Tender of rent — Estoppel — Rent Control Ordinance (Sarawak Cap. 86), s. 7, 15 and 19.

The plaintiff, the registered proprietor and landlord of premises at Sibu applied for an order for possession of part of the said premises occupied by the defendant. In earlier proceedings the defendant had been held to be a statutory tenant of the premises. The plaintiff demanded rent at $145 per month for the period 1.5.63 to 31.3.64. No payment was made and the plaintiff thereupon sent defendant a notice to quit.

Held: (1) the defendant as statutory tenant held the premises on the same terms as the original tenancy, that is at the rent of $145 a month;

(2) rent is lawfully due if no payment is made on the date of the notice to quit and if the defendant does not tender the rent, after demand has been made on or before the date of the notice to quit, the plaintiff is entitled to apply for an order for possession;

(3) in the circumstances of the case the court was justified in suspending the order for possession for as long as the defendant paid the monthly rent if and when it falls due and if he paid the sum due for arrears of rent and mesne profits.

Semble: Parties cannot defeat the provisions of the Rent Control Ordinance by estoppel and a tenant cannot be estopped from proving facts where those facts if proved enable him to claim protection.

Cases referred to:—

(1) *Overseas Chinese Banking Ltd.* v. *Eastern Auto Co. Ltd.* [1961] M.L.J. 302.

(2) *Welch* v. *Nagy* [1950] 1 K.B. 455.

(3) *Solle* v. *Butcher* [1950] 1 K.B. 672.

(4) *Regional Properties Ltd.* v. *Oxley* [1945] A.C. 347.

(5) *M. & J. S. Properties Ltd.* v. *White* [1959] 2 K.B. 25.

(6) *Lau Khiok Chu* v. *Lim Pek Huang* Kuching High Court Civil Appeal No. A/1/63.

(7) *Chong Fong Kwee* v. *Kong Gin Ham* [1959] M.L.J. 75.

(8) *Chop Lean Yak* v. *Ng Ah Hee* [1953] M.L.J. 6.

(9) *Penang Motors (1950) Ltd.* v. *Suah Motors* [1959] M.L.J. 133.

CIVIL SUIT.

C. T. Wong for the plaintiff.

George Seah Kim Seng for the defendant.

Cur. Adv. Vult.

Lee Hun Hoe J.C.: Plaintiff is the registered proprietor and landlord of the premises known as No. 15, Bank Road, Sibu. He prays for an order against defendant for possession of that part of the said premises occupied by defendant under paragraph (a) subsection (1) of section 15 of the Rent Control Ordinance (Cap. 86).

It will be useful to state briefly the history of this case. Originally plaintiff leased the said premises to Chop Nguong Sing. In 1954 on the latter surrendering the lease plaintiff leased the said premises to Ing Hing Leong. In 1958 Ing Hin Leong surrendered the lease and the said premises was leased to Kiing Sie Kuo. In March, 1963 this tenancy came to an end when Kiing Sie Kuo surrendered his lease. It would appear that defendant had been a sub-tenant of Chop Nguong Sing of part of the ground floor of the said premises paying a rent of $150.00 per month including the use of lighting and water. When Chop Nguong Sing's tenancy came to an

end plaintiff offered the tenancy of the said premises to defendant but he was not prepared to accept the offer as he could not afford to pay the rent. Defendant and another person named Yii Sui Moi then sent a joint letter (Exh. P.5) dated 1st May, 1954 to plaintiff indicating that they would vacate the part occupied by them unconditionally at the end of May, 1954. Yii Sui Moi apparently gave up his tenancy and so faded from the scene. But defendant stayed on and continued to pay rent to Ing Hing Leong and later to Kiing Sie Kuo. When Kiing Sie Kuo left the said premises defendant was still there. As a result plaintiff brought an action in this court against defendant for possession of that part of the said premises occupied by defendant. On 6th April, 1964 judgment was given in favour of defendant who was held to be a statutory tenant. That judgment has not been challenged by either party. On 8th April, 1964 plaintiff through his advocates wrote (Exh. D.5) to defendant demanding for rent at $145 per month (as there was no dispute that out of the $150 per month $5 was meant for payment of lighting and water) for the period from 1st May, 1963 to 31st March, 1964 amounting to $1,595. No payment was made. So on 30th April, 1964 plaintiff through his advocates sent defendant a notice to quit (Exh. P.4) by registered post. Since 5th May, 1964 defendant himself and through his advocates tendered arrears of rent but plaintiff refused to accept on the ground that notice to quit had been sent.

There is confusion on the exact amount of arrears of rent due. Both parties are to blame for this confusion, which is the result of a mathematical error. I refer to the letter dated 8th April, 1964 (Exh. D.5) in which plaintiff purported to demand for arrears of rent from 1st May, 1963 to 31st March, 1964 amounting to $1,595. This amount is clearly wrong because plaintiff by a letter dated 1st November, 1963 (Exh. D.4) accepted rent of $145 for the month of May, 1963 so that the actual amount should be $1,450. In the same way defendant wrote to plaintiff a letter dated 2nd June, 1964 (Exh. D.8) purporting to pay arrears of rent for the period, April, 1963 to May, 1964, amounting to $2,030 when he had already tendered two months' rent which had been accepted by plaintiff as payment of rent for April and May, 1963. Mr. Wong for plaintiff admitted that there is a mathematical error in his calculation of the amount. Mr. Seah for defendant submitted that because of a wrong calculation of the total amount of rent by plaintiff the demand became unlawful in that it was not "rent lawfully due" within the meaning of paragraph (a) subsection (1) of section 15 of the said Ordinance. No authority was quoted to support this proposition. I am aware of no authority on this point. At any rate I do not think such an error will be fatal to plaintiff's claim as a true perspective can be drawn from the facts.

The question of estoppel was raised. Mr. Wong argued that defendant is estopped from denying rent to be $145 per month because defendant had by several letters admitted the rent to be $145 per month. On the other hand Mr. Seah, while conceding that if estoppel applies then defendant is estopped only by his conduct, submitted that estoppel does not arise in this case. He referred to *Overseas Chinese Banking Ltd.* v. *Eastern Auto Co. Ltd.*[1] where Wee Chong Jin J. (as he then was) agreed with the contention of plaintiff's counsel on the authorities of *Welch* v. *Nagy*[2] and *Solle* v. *Butcher*[3] that parties cannot defeat the provisions of the Control of Rent Ordinance by estoppel. I agree with Mr. Seah on this point and hold that a tenant cannot be estopped from proving facts where those facts if proved enable him to claim protection.

There is no dispute that defendant is a statutory tenant of certain part of the ground floor of the said premises. Mr. Seah disputed that the rent was $145 per month. He pointed out that in the earlier case* between the parties McGilligan J. at page 16 paragraph 3 of his judgment says:—

> "It was a contractual licence, I hold, because part of the monthly sum paid as rent must have been in respect of the licence; but it must be presumed that it was a revocable licence, as the grantor, the head tenant, had power to grant it only for as long as he remained head tenant. This licence came to an end when Kiing Sie Kuo's tenancy terminated."

He also referred to another passage of the judgment at page 19 last paragraph which reads:—

> "The somewhat unusual effect of this judgment is this: *First*, the defendant is held to be a statutory tenant and entitled to remain in possession of the front room and of the room shaped like a crude L now occupied by him in No. 15, Bank Road, Sibu, (what the rent is to be the court cannot say, as part of the monthly sum previously paid by the defendant was in respect of the licence to the kitchen). *Second*, the plaintiff is entitled to possession of the kitchen at the back of these premises; as the plaintiff never gave permission to anyone (I hold) to erect any oven there, and as each person who held the head tenancy (including the one who was tenant when the oven was constructed) was under an obligation to hand the premises to the plaintiff in the same condition, as far as possible, as when his tenancy began, without additions or alterations which had not been agreed to, the plaintiff is entitled to get back the kitchen empty of the defendant's ovens and stoves, whether portable or semi-permanent. I consider it reasonable to give the defendant three months to remove from the kitchen."

Defendant was given three months to dismantle the ovens. He admitted during cross-examination that it was not until 22nd June, 1964 that he

* Sibu High Court Civil Case No. 90 of 1963.

stopped using the ovens. On this fact alone I fail to see how it can be argued that the rent up to 22nd June, 1964 was not $145 per month. Because up to that date defendant had lost nothing. I can well understand if the argument is that after that date rent was not $145 per month as such argument deserves due consideration. I therefore hold that up to 22nd June, 1964 the rent was $145 per month.

Now the position after 22nd June, 1964 will have to be considered. Section 19 of the said Ordinance reads:—

"A statutory tenant shall hold the premises of the landlord upon the following terms and conditions, namely:—

(a) he shall be deemed to hold as tenant from month to month and, subject thereto, shall observe and be entitled to the benefit of all the terms and conditions of the original tenancy, or sub-tenancy, as the case may be, so far as the same are consistent with the provisions of this Ordinance and with a holding from month to month:

Provided that, in the case of a sub-tenant becoming a statutory tenant under and by virtue of the provisions of sub-section (2) of section 16, such a statutory tenant shall in addition hold the premises subject to any subsisting restrictive covenants contained in the terms and conditions of the tenancy between the landlord and the tenant;

(b) his tenancy shall be subject to be determined by such notice as would have been required by law to determine a monthly tenancy of the premises containing no express provision for determination."

At page 16 paragraph 2 of his judgment McGilligan J. held that as from March, 1963 defendant became the tenant of plaintiff and on the same page paragraph 1 he expressed his opinion that the letter of 27th May, 1963 from plaintiff's advocates to defendant had the effect of terminating that licence. So that his rights save in the use of the kitchen had not been affected when he became plaintiff's tenant. The original tenancy in this case in my view refers to the tenancy not with Chop Nguong Sing or Ing Hing Leong or Kiing Sie Kuo but with plaintiff. Defendant's tenancy relates to the certain part occupied by him and may be referred to as the "premises". I have read the record of the earlier case between the parties. The letter dated 27th May, 1963 from plaintiff's advocates to defendant was a notice to quit. By remaining on the "premises" after the expiration of the notice he acquired the status of a statutory tenant. As such he held the "premises" subject to the provisions of the said section 19. Under the term of the original tenancy the monthly rent was $145 per month. Defendant also enjoyed certain rights in common with the other tenants. Mr. Seah is now saying that because the right to use the kitchen was taken away from defendant therefore the rent should be reduced accordingly. In support he relied on the passages of McGilligan J.'s judgment mentioned previously. It seems to me in the second passage, the learned judge was clearly thinking of the position after the revocation of the licence to the kitchen as a result of his order. This must be obvious because defendant was enjoying the use of the kitchen all along up to the date of the judgment. In fact defendant admitted that he did not stop using the kitchen until 22nd June, 1964. Unfortunately the learned judge also had expressed his opinion that part of the monthly sum previously paid by the defendant was in respect of the licence to the kitchen. In *Regional Properties, Ltd.* v. *Oxley* (4) a tenancy agreement for a monthly tenancy of a flat at a yearly rent of £90, the standard rent under the Rent Restriction Acts, provided for a specified reduction of rent on punctual payment. The landlords gave notice of a statutory increase of rent. This operated as a notice to quit and on the expiry of which a statutory tenancy came into existence. Respondent instituted proceedings in a county court claiming to be entitled to the benefit of the proviso for the reduction of rent on punctual payment. He succeeded in the county court. Appellant's appeal to Court of Appeal was dismissed. On appeal the House of Lords allowed the appeal and held that the proviso for reduction of rent on punctual payment was not consistent with the provisions of the Rent and Mortgage Interest (Restriction) Act, 1920, within the meaning of section 15, subsection (1), and accordingly the tenant was not entitled to the benefit of it. In his judgment at page 355 Lord McMillan said:—

"I am disposed to agree with the view expressed by Maugham L.J. as he then was, *in Phillips* v. *Gopping* where he says of section 15, subsection 1, of the Act of 1920 that the phrase as to the statutory tenant being entitled to the benefits of all the terms and conditions of the original tenancy so far as consistent with the provisions of the Act 'is not so framed as to extend to the case of payment of rent. It is not dealing with rent.' "

In my view the same interpretation can be given to the said section 19. In effect Mr. Seah is contending that amongst the terms of his original tenancy which have been imported into defendant's statutory tenancy is the provision that his rent should be reduced as his right to the use of the kitchen was taken away. To agree with such contention would be to incorporate a term inconsistent with the provisions of the said Ordinance. With the greatest respect and deference to McGilligan J. I therefore differ from his view that the sum paid as rent was in respect of the licence to the kitchen.

There is another reason why I consider the sum paid was rent of the tenancy and not in respect of the licence of the kitchen. By virtue of his tenancy defendant was entitled to enjoy certain incorporeal rights in common with other tenants. Such rights must be regarded as gratituous unless there is evidence to show otherwise. Those rights are not protected by

the provisions of the Rent Control Ordinance and are revocable in certain circumstances. Thus by constructing permanent ovens on the kitchen defendant deprived others from enjoying their common right to the use of the kitchen. Defendant purported to exercise exclusive right, which he never had, to the use of the kitchen. Therefore his right to use the kitchen was properly revoked. I have mentioned that defendant's tenancy relates to the part occupied by him and referred to as the "premises". The word "premises" was directed to premises capable of physical occupation and not to an incorporeal right, such as the use in common with other tenants of a garden, which might be added to a tenancy: *M. and J. S. Properties Ltd.* v. *White* [5]. I hold that unless there is clear evidence to show that the parties agreed that the rent paid for the tenancy of the "premises" include payment for the licence to the kitchen then the rent paid is for the tenancy of the "premises" only and nothing else. For instance, there was clear evidence that out of the $150 rent paid $5 was meant for the right to use lighting and water.

Mention was made regarding standard rent and the Rent Control Board. In the light of the view I take it is not necessary for me to decide these matters which will complicate the issue. However I would point out that a tenant has a right under section 7 of the Rent Control Ordinance to request the landlord to supply him with a statement in writing concerning the standard rent of the premises. As regard the Rent Control Board either party is entitled to make application to the said Board to fix rent but this advantage has not been taken by either party.

Mr. Seah then pointed out that defendant had tendered rents at $145 per month for the months of April to June, 1963 but plaintiff refused to accept. However, rents tendered by defendant for July and October, 1963 were accepted by plaintiff without prejudice as rents for April and May, 1963. Mr. Seah submitted that once rent had been tendered by defendant and rejected by plaintiff demand by plaintiff for the rejected tender would be unlawful. For that proposition he referred to the case of *Lau Khiok Chu* v. *Lim Pek Hung.*[6] That was an appeal from the Kuching district court. There the learned magistrate as he then was refused to make an order for possession on the ground that rent had been tendered and he ordered the tenant to pay the arrears of rent by monthly instalments of $10 (as he apparently regarded the arrears of rent as a debt). In that case the appellant used discredited manoeuvre to achieve his purpose and the court showed its disapproval by refusing to make an order for possession. Appellant's appeal was dismissed. In my opinion by no stretch of the imagination can it be said the judgment enunciates such sweeping proposition as submitted. Each case must be decided according its particular facts.

What happened in this case was that defendant tendered rents for April to June, 1963 and plaintiff refused to accept. Later defendant tendered rents for July and October, 1963 and plaintiff accepted and indicated that he regarded the rents as for April and May, 1963. During cross-examination plaintiff explained that he refused to accept the rents at the time because defendant was supposed to move out and he was supposed to give defendant $1,500 as soon as defendant moved out but defendant changed his mind. Possibly defendant thought the money was not attractive enough. Eventually defendant tendered rents for July and October, 1963 and these were accepted without prejudice as rents for April and May, 1963 as at the time notice to quit had been sent to defendant. Plaintiff appeared to be a sincere and truthful witness. On the other hand I find defendant rather evasive. Therefore between the two witnesses I do not hesitate to accept plaintiff's evidence.

Paragraph (a) of subsection (1) of section 15 of the said Ordinance reads as follows:—

> "15. (1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely—
>
> (a) where at the date of the notice determining the tenancy given by the landlord, rent lawfully due was in arrear for twenty-one days or upwards after demand in writing and there was no tender thereof at or before such date;"

Both counsel referred me to the case of *Chong Fong Kwee* v. *Kong Gim Ham.*[7] Rigby J. in the course of his judgment discussed the meaning of rent "lawfully due" at page 76 in the following manner:—

> "Rent is 'lawfully due' as soon as the proper date for payment has arrived. If rent 'lawfully due' is in arrears for 14 days or upwards, then it seems to me that the landlord has a right of action — I hesitate to call it a vested interest — to institute proceedings for the recovery of possession, and I do not think that right of action can be stultified or negatived by subsequent tender to him of the arrears due unless, of course, he chooses to waive the breach by an unconditional acceptance of such tender. To my mind the proviso to the paragraph strengthens that view. Rent shall not be deemed to be in arrears if the tenant proves that it was tendered before such date. To avail the tenant any protection the rent must be tendered before the expiration of the 14 'days of grace' and if it is not so tendered then the landlord is entitled to ask for an order for possession."

In our Ordinance the words "and there was no tender thereof at or before such date" clearly refer to the date of the notice to quit. Thus rent becomes "lawfully due" if no payment is made on the date of the notice to quit. If defendant seeks any protection he must tender rent, after demand has been made, on or before the date of the notice

to quit. If he does not do so plaintiff is entitled to come to court and ask for an order for possession. In our case the period of grace would be "21 days or upwards" depending on the day the notice to quit is given.

It is true that in his judgment in *Lau Khiok Chu* v. *Lim Pek Hung* [6] Simpson J. did express his opinion that rent having been duly tendered every month no rent was in arrear but the amount might be considered as owing as a debt. In that case appellant had no reason to refuse to accept the tender of rent. Assuming that the rents for April to June, 1963 had been tendered and rejected and according to *Lau Khiok Chu* v. *Lim Pek Hung* the amount would be considered as a debt. Payment of rents for July and October, 1963 were tendered and accepted. So that when plaintiff after demand sent a notice to quit dated 30th April, 1964 there can be no doubt that rent "lawfully due" for November, 1963 to 31st March, 1964 was in arrears for "21 days or upwards" on the date of the notice to quit.

In any event whether one takes the view that rents for April to June, 1963 are to be regarded as a debt or whether the view that such rents are not to be so regarded but as arrears of rent after demand in writing the result would be the same in this case.

It is incumbent upon plaintiff to make a demand for rent before he can say that rent is in arrear and that once lawful demand is made it is the duty of the defendant to pay. This view is strengthened by two cases. In *Chop Lean Yak* v. *Ng Ah Hee* [8] Spenser Wilkinson J. after referring to various authorities concerning the duty of the landlord to demand payment of rent said:—

"Upon these authorities I felt bound to hold that it is the duty of the landlord to make a demand for rent on the premises and that if he does not do so he cannot rely upon the proposition that rent is in arrears."

That case was referred to in *Penang Motors (1950) Ltd.* v. *Suah Motors* [9] where it was held that where rent was payable in advance and demand was made and rent paid the day after the demand rent was therefore not in arrear at the date of the service of the notice to quit. Rigby J. in the course of his judgment expressed his opinion on the question of demand at page 136 as follows:—

"where there is an agreement to pay rent monthly in advance, coupled with an obligation on the part of the landlord to make a demand for payment of such rent on the premises, then clearly there is a duty upon the tenant to pay the rent when it is so lawfully demanded on the premises. But there can be no default in payment unless and until that demand has been made. In my view, therefore, a tenant can only be said to be in arrears as from the date the lawful demand for payment is made and arrears can only be said to run from that date. The meaning of the word 'arrear' was considered in a Canadian case dealing with a contract requiring payment of monies. In that case the Court said — 'We take arrears to mean something which is behind in payment or which remains unpaid . . . It implies a duty and a default' (*Corbett* v. *Taylor*, (1864) 23 U.C.R. 454, C.A., *per cur.* at page 455)".

In the result for reasons given I hold that the rent payable is $145 per month and that as rent lawfully due was in arrear on the date of the notice to quit plaintiff is entitled to an order for possession under paragraph (a) subsection (1) of section 15 of the Rent Control Ordinance (Cap. 86). Costs to plaintiff I would assess at $300. However in this case the circumstances are such I consider that I am justified in exercising my discretion in favour of defendant on the question of suspending the order for possession. Therefore I order that the order for possession be suspended for as long as (1) the defendant pays the monthly rent of $145 regularly if and when it falls due; and (2) the defendant pays the sum of $2,175 for the period from 1st June, 1963 to 31st August, 1964 to cover arrears of rent and mesne profits, and cost of $300 within seven days.

Order accordingly.

IN RE APPLICATIONS OF (1) CHONG FYE LEE & (2) TOONG HING LOONG TIN MINING CO. LTD.

[O.C.J. (Azmi J.) September 16, 1964]

[J.B. — Originating Motions Nos. 2 and 3 of 1964]

Administrative Law — Judicial review — Certiorari — Whether revision includes revision by High Court under certiorari.

Practice and Procedure — Appeal — No revision where appeal lies — Courts of Judicature Act, 1964, ss. 2, 32, 33 and 34.

Mining Enactment, No. 69, ss. 100 to 102 — Whether warden of mines holding inquiries is subordinate court under Mining Enactment.

These were applications for orders of *certiorari* to quash orders of the warden of mines, Johore. A preliminary objection was taken that the court has no jurisdiction to hear the application by virtue of the provisions of section 34 of the Courts of Judicature Act, 1964, which provides "where an appeal lies from any decision in any civil matter and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed".

Held: (1) a warden of mines holding inquiries under the Mining Enactment is an inferior court within the meaning of the words given in the definition of "Subordinate Court" in section 2 of the Courts of Judicature Act, 1964;

(2) proceedings by way of revision would include revision under *certiorari* and therefore as the applicants in this case could have appealed but did not, their applications for *certiorari* must be dismissed.

Case referred to:—

(1) *R.* v. *Electricity Commissioner* [1924] 1 K.B. 171 at p. 204.